Icon City Development Sdn Bhd (formerly known as Sierra Peninsular Development Sdn Bhd) v Lee Kean Hwa & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)-3–01 OF 2025(W)
RHODZARIAH BUJANG, HANIPAH FARIKULLAH AND LEE SWEE SENG FCJJ
22 OCTOBER 2025

Contract — Agreement — Sale and purchase of property — Late delivery of vacant possession — Respondents applied for summary judgment claiming for liquidated damages — Commencement of period for delivery of vacant possession — Whether question of law arising from facts not in dispute may be disposed of by way of summary judgment application — Whether 'time for delivery of vacant possession' was to be calculated from date of period of time set out in contract for event which occurred within period of time, or whether calculation ought to begin from expiry of period of time — Whether when 'time for delivery of vacant possession' was provided to be calculated from date of period of time for approval of 'building plans' which had been defined to include 'any and all such amendments, alterations and modifications thereto', then should calculation begin from date of first/original approval of building plans or relevant date of last amendment of building plans subject to prescribed period of time — Whether there ought for some other reason to be trial of claim — Whether appellant may be allowed to raise fresh question of law

The respondents ('plaintiffs') had each entered into sale and purchase agreements ('SPA') with the property developer ie the appellant ('defendant') for the purchase of stratified mixed commercial and residential units. Pursuant to the SPA, the defendant was required under cl 35A to obtain both: (a) conversion approval for the land; and (b) building plan approval. These approvals were to be obtained within 12 months from the date of the SPA, with a further extension of six months permitted ('the approval period' or 'extended approval period'). Section 10 of Schedule A of the SPA provided that delivery of vacant possession of the property was to be within 42 calendar months from the date of the approval period or the extended approval period. The plaintiffs applied for summary judgment pursuant to O 14 of the Rules of Court 2012 ('the ROC'), premised on a claim for liquidated damages ('LD') due to the late delivery of vacant possession. The plaintiffs contended that the 42-month period should be computed from 2 August 2012, being the date when both requisite approvals were obtained. The defendant disputed this interpretation and contended that: (i) the 42-month period should instead commence from 17 November 2015 (the date of the last building plan amendment) or, alternatively, from the expiry of the full 18 month approval

period; and (ii) these competing interpretations gave rise to triable issues, rendering the matter unsuitable for summary judgment. The learned High Court judge was of the view that cl 35A of the SPA required the defendant, as developer, to obtain both the conversion approval and the building plan approval. The conversion approval was obtained on 17 January 2012, and the building plan approval was obtained on 2 August 2012. As both approvals were obtained within the 12-month approval period contemplated by the SPA, the High Court held that the computation of the 42-months must begin from 2 August 2012. Thus, the High Court held that it was a fit and proper case to grant summary judgment. The defendant appealed to the Court of Appeal but was dismissed. Hence, this appeal. The issues for determination were: (A) whether a question of law arising from facts not in dispute may be disposed of by way of a summary judgment application; (B) whether the 'time for delivery of vacant possession' was to be calculated from a date of a period of time set out in the said contract for an event which occurred within the said period of time, or whether the said calculation ought to begin from the expiry of the said period of time; (C) whether when the 'time for delivery of vacant possession' was provided to be calculated from a date of a period of time for approval of 'building plans' which had been defined to include 'any and all such amendments, alterations and modifications thereto', then should the calculation begin from the date of the first/original approval of the building plans or the relevant date of the last amendment of the building plans subject to the prescribed said period of time; (D) whether there ought for some other reason to be a trial of the claim; and (E) whether the appellant may be allowed to raise a fresh question of law not raised in the questions of law for which the Federal Court had granted leave to appeal.

Held, dismissing the appeal:

(1) The issue of interpretation of contract was a pure question of law which was plainly within the purview of the court to decide in hearing a summary judgment application. Where the facts necessary to decide a dispute were not in issue and everything hinged on the interpretation of the relevant clauses as in this case, in the SPA with respect to a claim for LD for a late delivery claim, such a claim could be more than appropriately disposed of by way of a summary judgment application. It was perfectly proper to allow a summary judgment to be entered even though the claim may be for a huge sum (see paras 30–31 & 36).

(2) The 'time for delivery of vacant possession' had been objectively stated under section 10 (Schedule A) to be 42 months from the date of the period of approval or the extended approval period. Thus, if the date of approval of the building plans was on a date after the SPA was signed and within the period of the 12 months from the date of the SPA, then that date was taken to be the date from which the 42 months was calculated. The appellant took the earliest SPA date as 19 August 2011 which would

then yield the expiry of the 12-month period of approval to be 19 August 2012 and the further extension of six months under the extended approval period to be 19 February 2013. The 42 months to deliver vacant possession should then run from 2 August 2012 which was 'from the date of the period of approval' and not from the date of the expiry of the period of approval which was 19 August 2012. It did not comport with business common sense to say that whilst the building plans approval had been before the expiry of the approval period, one must still wait for the expiry of the period of approval when section 10 did not say that. There was also no rationale for postponing the date time started to run for completion since construction could already be commenced once the building plans were approved. The relevant calculation under cl 13.1.2 was that the LD shall be calculated 'from the date of expiry of the period stated in section 10 of Schedule A hereto or the extended date' which was different from the 'date of the period of approval or the extended approval period', the former being an objectively referenced date from the date of the first approval of the building plans and not 'from the date of expiry of the period,' the latter being 19 August 2012 (see paras 41–43, 45 & 50).

(3) The appellant's interpretation of making the 42 months ran from the date of the last approval of the amended building plans would mean that the 42 months to deliver vacant possession could be a moving or roving time as before any amended building plans were submitted for approval, the 42 months was fixed but then it could recommence at a later date depending on the number of amended building plans that may be subsequently submitted which the local authority may approve. That kind of an interpretation would not comport with business common sense and indeed it would fly against the provision of cl 38.16 that had made time wherever mentioned to be of the essence of the contract in relation to all provisions of the SPA. Such an interpretation would also be a fertile ground for abuse as the appellant sensing that completion would be due could always put in another amendment no matter how minor and once approved by the local authority, would secure a fresh extension of time to deliver vacant possession. Context was paramount and this was captured by the qualifying words in cl 1.1 of the SPA, 'where the context so admits.' It did not necessarily mean that each time the expression 'building plans' appeared one must read it to cover 'amended or altered or modified building plans'. Where the grammatical meaning of the definition of 'building plans' would be wide enough to cover even all and any including the last approved building plans, the context did not admit it for the purpose of determining the time for delivery of vacant possession which was to run from the date of the first approval of the building plans. The meaning of the date of the approval of 'building plans' could not stretch to that of the date of the last approval of 'building plans' for the purpose of determining the 42 months to deliver vacant

possession even though pedantically and definition-wise 'building plans' would include 'all amendments, alterations and modifications to the building plans' (see paras 57–59, 65, 68 & 72).

(4) There was nothing devious or crafty where the claim was concerned and neither was there any need for any further investigation into the facts. Therefore, the argument of the appellant that the difficulties presented in interpreting the relevant provisions on LD claim would bring this claim within the rubric of O 14 r 3 of the ROC where 'there ought for some other reason to be a trial of that claim' was dismissed (see paras 77–78).

(5) The Federal Court would not generally venture to answer questions raised for the first time when the appeal was heard with respect to the questions of law that had been allowed to be argued during leave stage when the justice of the case did not demand it as in preventing a miscarriage of justice. Both the High Court and the Court of Appeal had arrived at a concurrent finding that the summary judgment containing the judgment sum as prayed for was rightly entered against the appellant. The appellant could not be arguing an objection to a summary judgment application in stages, searching for a new triable issue or stumbling across it as it exhausted the last rung of appeal. Thus, the court should not exercise its discretion to allow a fresh question of law to be answered when it was not argued in the High Court nor the Court of Appeal. The ends of justice did not demand it (see paras 81, 85 & 91).

[Bahasa Malaysia summary

Responden ('plaintif') masing-masing telah memeterai perjanjian jual beli ('PJB') dengan pemaju hartanah iaitu perayu ('defendan') untuk pembelian unit komersial dan kediaman bercampur berstrata. Menurut PJB, defendan dikehendaki di bawah klausa 35A untuk mendapatkan kedua-dua: (a) kelulusan penukaran tanah; dan (b) kelulusan pelan bangunan. Kelulusan-kelulusan ini perlu diperoleh dalam tempoh 12 bulan dari tarikh PJB, dengan lanjutan enam bulan lagi dibenarkan ('tempoh kelulusan' atau 'tempoh kelulusan lanjutan'). Seksyen 10 Jadual A PJB memperuntukkan bahawa serahan milikan kosong hartanah adalah dalam tempoh 42 bulan kalendar dari tarikh tempoh kelulusan atau tempoh kelulusan lanjutan. Plaintif memohon penghakiman terus menurut A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM'), berdasarkan tuntutan ganti rugi tertentu ('LD') disebabkan kelewatan serahan milikan kosong. Plaintif berhujah bahawa tempoh 42 bulan perlu dikira dari 2 Ogos 2012, iaitu tarikh kedua-dua kelulusan yang diperlukan telah diperoleh. Defendan mempertikaikan tafsiran ini dan berhujah bahawa: (i) tempoh 42 bulan sebaliknya perlu bermula dari 17 November 2015 (tarikh pindaan pelan bangunan terakhir) atau, secara alternatif, dari tamat tempoh kelulusan penuh 18 bulan; dan (ii) tafsiran-tafsiran yang bersaing ini menimbulkan isu-isu boleh dibicarakan, menjadikan perkara itu tidak sesuai untuk penghakiman terus. Hakim

Mahkamah Tinggi yang bijaksana berpendapat bahawa klausa 35A PJB menghendaki defendan, sebagai pemaju, untuk mendapatkan kedua-dua kelulusan penukaran dan kelulusan pelan bangunan. Kelulusan penukaran telah diperoleh pada 17 Januari 2012, dan kelulusan pelan bangunan diperoleh pada 2 Ogos 2012. Oleh kerana kedua-dua kelulusan telah diperoleh dalam tempoh kelulusan 12 bulan yang diperuntukkan oleh PJB, Mahkamah Tinggi memutuskan bahawa pengiraan tempoh 42 bulan mesti bermula dari 2 Ogos 2012. Oleh itu, Mahkamah Tinggi memutuskan bahawa ini adalah kes yang sesuai dan wajar untuk diberikan penghakiman terus. Defendan merayu ke Mahkamah Rayuan tetapi telah ditolak. Oleh itu, rayuan ini. Isu-isu untuk penentuan adalah: (A) sama ada persoalan undang-undang yang timbul daripada fakta yang tidak dipertikaikan boleh diselesaikan melalui permohonan penghakiman terus; (B) sama ada 'masa untuk serahan milikan kosong' perlu dikira dari tarikh tempoh masa yang dinyatakan dalam kontrak bagi peristiwa yang berlaku dalam tempoh masa tersebut, atau sama ada pengiraan tersebut perlu bermula dari tamat tempoh masa tersebut; (C) sama ada apabila 'masa untuk serahan milikan kosong' diperuntukkan untuk dikira dari tarikh tempoh masa bagi kelulusan 'pelan bangunan' yang telah ditakrifkan untuk merangkumi 'semua dan sebarang pindaan, pengubahan dan pengubahsuaian kepadanya', maka adakah pengiraan perlu bermula dari tarikh kelulusan pertama/asal pelan bangunan atau tarikh berkaitan pindaan pelan bangunan terakhir tertakluk kepada tempoh masa yang ditetapkan; (D) sama ada terdapat sebab lain untuk perbicaraan tuntutan tersebut; dan (E) sama ada perayu boleh dibenarkan untuk mengemukakan persoalan undang-undang baharu yang tidak dibangkitkan dalam persoalan undang-undang yang telah diberikan kebenaran oleh Mahkamah Persekutuan untuk merayu.

Diputuskan, menolak rayuan:

(1) Isu tafsiran kontrak adalah persoalan undang-undang tulen yang jelas berada dalam bidang kuasa mahkamah untuk memutuskan dalam mendengar permohonan penghakiman terus. Di mana fakta-fakta yang perlu untuk memutuskan pertikaian tidak dipertikaikan dan segala-galanya bergantung pada tafsiran klausa-klausa yang relevan seperti dalam kes ini, dalam PJB berkaitan dengan tuntutan LD untuk kelewatan serahan, tuntutan sedemikian boleh diselesaikan dengan cara permohonan penghakiman terus yang lebih sesuai. Adalah wajar untuk membenarkan penghakiman terus dimasukkan walaupun tuntutan itu mungkin melibatkan amaun yang besar (lihat perenggan 30–31 & 36).

(2) 'Masa untuk serahan milikan kosong' telah dinyatakan secara objektif di bawah seksyen 10 (Jadual A) sebagai 42 bulan dari tarikh tempoh kelulusan atau tempoh kelulusan lanjutan. Oleh itu, jika tarikh kelulusan pelan bangunan adalah pada tarikh selepas PJB ditandatangani dan dalam tempoh 12 bulan dari tarikh PJB, maka tarikh tersebut diambil

sebagai tarikh dari mana 42 bulan dikira. Perayu mengambil tarikh PJB terawal sebagai 19 Ogos 2011 yang kemudiannya akan menghasilkan tamat tempoh kelulusan 12 bulan pada 19 Ogos 2012 dan lanjutan enam bulan di bawah tempoh kelulusan lanjutan pada 19 Februari 2013. Tempoh 42 bulan untuk menyerahkan milikan kosong sepatutnya bermula dari 2 Ogos 2012 yang merupakan 'dari tarikh tempoh kelulusan' dan bukan dari tarikh tamat tempoh kelulusan yang mana adalah 19 Ogos 2012. Ia tidak selari dengan akal budi perniagaan untuk mengatakan bahawa walaupun kelulusan pelan bangunan telah diperoleh sebelum tamat tempoh kelulusan, seseorang masih perlu menunggu tamat tempoh kelulusan apabila seksyen 10 tidak menyatakan demikian. Tiada juga rasional untuk menangguhkan tarikh masa mula berjalan untuk penyiapan memandangkan pembinaan sudah boleh dimulakan sebaik sahaja pelan bangunan diluluskan. Pengiraan yang relevan di bawah klausa 13.1.2 adalah bahawa LD hendaklah dikira 'dari tarikh tamat tempoh yang dinyatakan dalam seksyen 10 Jadual A atau tarikh lanjutan' yang berbeza dari 'tarikh tempoh kelulusan atau tempoh kelulusan lanjutan', yang sebelumnya adalah tarikh rujukan objektif dari tarikh kelulusan pertama pelan bangunan dan bukan 'dari tarikh tamat tempoh', yang kemudiannya adalah 19 Ogos 2012 (lihat perenggan 41–43, 45 & 50).

(3) Tafsiran perayu yang menyatakan bahawa 42 bulan bermula dari tarikh kelulusan terakhir pelan bangunan yang dipinda akan bermakna bahawa 42 bulan untuk menyerahkan milikan kosong boleh menjadi masa yang berubah-ubah atau bergerak kerana sebelum sebarang pelan bangunan yang dipinda diserahkan untuk kelulusan, tempoh 42 bulan adalah tetap tetapi kemudian ia boleh bermula semula pada tarikh yang lebih lewat bergantung kepada bilangan pelan bangunan yang dipinda yang mungkin diserahkan kemudiannya dan diluluskan oleh pihak berkuasa tempatan. Tafsiran sedemikian tidak selari dengan akal budi perniagaan dan sememangnya akan bercanggah dengan peruntukan klausa 38.16 yang menyatakan bahawa masa di mana-mana yang disebut adalah intipati kontrak berkaitan dengan semua peruntukan PJB. Tafsiran sedemikian juga akan menjadi alasan untuk penyalahgunaan kerana perayu yang merasa bahawa penyiapan akan tiba boleh sentiasa membuat pindaan lain tidak kira betapa kecilnya dan sebaik sahaja diluluskan oleh pihak berkuasa tempatan, akan mendapatkan lanjutan masa baru untuk menyerahkan milikan kosong. Konteks adalah penting dan ini tercakup dalam perkataan kelayakan dalam klausa 1.1 PJB, 'di mana konteks mengizinkan'. Ia tidak semestinya bermaksud bahawa setiap kali ungkapan 'pelan bangunan' muncul seseorang mesti membacanya untuk merangkumi 'pelan bangunan yang dipinda atau diubah suai'. Di mana makna tatabahasa takrifan 'pelan bangunan' akan cukup luas untuk merangkumi semua dan mana-mana termasuk pelan bangunan yang

diluluskan terakhir, konteks tidak mengizinkannya untuk tujuan menentukan masa serahan milikan kosong yang akan berjalan dari tarikh kelulusan pertama pelan bangunan. Makna tarikh kelulusan 'pelan bangunan' tidak boleh meluas sehingga tarikh kelulusan terakhir 'pelan bangunan' untuk tujuan menentukan 42 bulan untuk menyerahkan milikan kosong walaupun secara berhati-hati dan definisi 'pelan bangunan' akan merangkumi 'semua pindaan, pengubahan dan pengubahsuaian kepada pelan bangunan' (lihat perenggan 57–59, 65, 68 & 72).

(4) Tiada apa-apa yang licik atau muslihat berkaitan tuntutan itu dan tiada keperluan untuk siasatan lanjut mengenai fakta-fakta. Oleh itu, hujah perayu bahawa kesulitan dalam menafsirkan peruntukan yang relevan mengenai tuntutan LD akan membawa tuntutan ini di bawah rubrik A 14 k 3 KKM di mana 'terdapat sebab lain untuk perbicaraan tuntutan tersebut' telah ditolak (lihat perenggan 77–78).

(5) Mahkamah Persekutuan secara amnya tidak akan menjawab persoalan undang-undang yang dibangkitkan buat kali pertama apabila rayuan didengar berkaitan dengan persoalan undang-undang yang telah dibenarkan untuk dihujah pada peringkat kebenaran apabila keadilan kes tidak menuntutnya seperti dalam mencegah salah laku keadilan. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah mencapai penemuan yang selari bahawa penghakiman terus yang mengandungi jumlah penghakiman seperti yang dipohon telah dimasukkan dengan betul terhadap perayu. Perayu tidak boleh membantah permohonan penghakiman terus secara berperingkat, mencari isu boleh bicara baharu atau menemuinya kerana ia telah menghabiskan peringkat terakhir rayuan. Oleh itu, mahkamah tidak seharusnya melaksanakan budi bicaranya untuk membenarkan persoalan undang-undang baharu dijawab apabila ia tidak dihujahkan di Mahkamah Tinggi mahupun Mahkamah Rayuan. Keadilan tidak menuntutnya (lihat perenggan 81, 85 & 91).]

Cases referred to

Abd Rahman bin Soltan & Ors v Federal Land Development Authority & Anor and other appeals [2023] 4 MLJ 318, CA (refd)

Arbuthnott v Fagan & Others [1994] Lexis Citation 4136; [1995] CLC 1396, CA (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd [1990] 3 MLJ 1, HC (refd)

Diamond Peak Sdn Bhd & Anor v Tweedie [1980] 2 MLJ 31, FC (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)

Esso Standard Malaya Bhd v Southern Cross Airways (M) Bhd [1972] 1 MLJ 168 (refd)

Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196, FC (refd)
Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)
Melawangi Sdn Bhd v Tiow Weng Theong [2020] 3 MLJ 677, FC (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337, FC (refd)
Miles v Bull [1968] 3 All ER 632, KBD (refd)
Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor [2018] 4 MLJ 34; [2018] 4 CLJ 705, FC (folld)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257; [2003] 3 CLJ 349, FC (refd)
Teoh Kiang Hong v Theow Say Kow @ Teoh Kiang Seng, Henry [2025] 1 MLJ 813; [2025] 2 CLJ 683, FC (refd)
The New Straits Times Press (M) Bhd v Aideah Communication Sdn Bhd [2025] 3 MLJ 240; [2025] 5 CLJ 661, FC (refd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 69(1), 96
Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989 Schedules G, H
Rules of Court 2012 O 14, O 14 r 3
Rules of the Federal Court 1995 rr 47(4), 57(2)
Rules of the Supreme Court 1957 (repealed by the Rules of the High Court 1980) O 14

Appeal from: *Icon City Development Sdn Bhd (Dahulu dikenali sebagai Sierra Peninsular Development Sdn Bhd) v Lee Kean Hwa & Ors and other appeals* [2025] MLJU 1918 (Court of Appeal, Putrajaya)

Justin Voon Tiam Yu (with Lim Xin Yi) (Justin Voon Chooi & Wing) for the appellant.
Low Joo Hean (with Chan Kim Weng) (Ching, Tan & Assoc) for the respondent.

Lee Swee Seng FCJ:

[1] This appeal originated from the plaintiffs' application for summary judgment pursuant to O 14 of the Rules of Court 2012 ('the ROC 2012'), premised on a claim for liquidated damages ('LD') due to the late delivery of

vacant possession under the terms of the sale and purchase agreements ('SPA') entered into between the parties.

[2] The appeal involved a claim by 62 individuals as plaintiffs who had each entered into SPAs with the property developer, Icon City Development Sdn Bhd (formerly known as Sierra Peninsular Development Sdn Bhd), the defendant, for the purchase of stratified mixed commercial and residential units, namely small office versatile office ('SOVO') units located in Tower 3 and Tower 3A of a development project.

[3] Pursuant to the SPA, the defendant was required under cl 35A to obtain both: (a) conversion approval for the land; and (b) building plan approval. These approvals were to be obtained within 12 months from the date of the SPA, with a further extension of six months permitted, collectively referred to as the approval period or extended approval period.

[4] Section 10 of Schedule A of the SPA provided that delivery of vacant possession of the property was to be within 42 calendar months from the date of the approval period or the extended approval period.

IN THE HIGH COURT

[5] In their summary judgment application, the plaintiffs contended that the 42 month period should be computed from 2 August 2012, being the date when both requisite approvals were obtained. By this calculation, delivery of vacant possession was due on 1 February 2016.

[6] The plaintiffs alleged that, as delivery occurred after that date, they were entitled to LD for the period of delay, calculated at the contractual rate of 10%pa on the purchase price, on a daily rest basis.

[7] Meanwhile, the defendant disputed this interpretation and contended that the 42 month period should instead commence from 17 November 2015 (the date of the last building plan amendment) or, alternatively, from the expiry of the full 18 month approval period. The defendant further submitted that these competing interpretations gave rise to triable issues, rendering the matter unsuitable for summary judgment.

[8] The relevant factual chronology and key timeline were as follows:

No	Dates	Details
1	17 January 2012	The defendant obtained approval from the local authority ('LA') for the conversion of the use of land to commercial use.
2	2 August 2012	The LA's first approval of the defendant's building plans obtained.
3	17 November 2015	The LA's last approval for amendments to the building plans for Tower 3 in the development area (Tower 3).
4	20 November 2015	The LA's last approval for amendments to the building plans for Tower 3A in the development area (Tower 3).
5	2 September 2016	The defendant issued vacant property notice to the purchasers for Tower 3.
6	15 September 2016	Deemed delivery of vacant possession for Tower 3 units
7	22 September 2016	The defendant issued vacant property notice to the purchasers for Tower 3A.
8	6 October 2016	Deemed delivery of vacant possession for Tower 3A units

[9] The High Court determined that the central legal issue was the correct date from which the 42 month period for delivering vacant possession should begin.

[10] The learned High Court judge was of the view that cl 35A of the SPA required the defendant, as developer, to obtain both the conversion approval and the building plan approval. The conversion approval was obtained on 17 January 2012, and the building plan approval was obtained on 2 August 2012.

[11] As both approvals were obtained within the 12 month approval period contemplated by the SPA, the High Court held that the computation of the 42 months must begin from 2 August 2012.

[12] The High Court rejected the defendant's suggestion that the computation should begin from either 17 November 2015, being the date of approval of the last amended building plan, or from the expiry of 18 months comprising the 12 month period and the six-month extension.

[13] The High Court found no ambiguity in the relevant SPA clauses. Section 10 of Schedule A clearly governed the computation period. The High Court also found that there were no triable issues warranting a full trial. The material facts, including the dates of approval and delivery, were not disputed and were evidenced by documentation.

[14] The dispute involved a question of contractual interpretation, which was a matter of law. As such, it was suitable for determination by way of summary judgment under O 14 of the ROC 2012.

[15] The High Court found the material facts, including approval timelines and SPA terms, to be clear and undisputed. The dispute was purely a legal one on contract interpretation. As the terms were unambiguous, the High Court held that it was a fit and proper case to grant summary judgment.

IN THE COURT OF APPEAL

[16] The defendant appealed to the Court of Appeal. The Court of Appeal upheld the High Court's decision to grant summary judgment, concluding that the SPAs were commercial contracts and as such the business common sense interpretation is to be applied in reading the SPAs.

[17] In doing so, the Court of Appeal rejected the defendant's contention that the 42-month period for delivery of vacant possession should begin from the last amended building plan approval. Instead, the court determined that the said period commenced from the first approval of the building plans, which had enabled construction to begin, making this interpretation commercially sensible and consistent with the SPA's terms.

[18] The court emphasised that cl 13.1.1, read together with section 10 of Schedule A and cl 35A.1, clearly stated that the 42-month delivery timeline started from the period of approval or extended approval period, defined as beginning on the date the requisite approvals (conversion and building plans) were first obtained, not from any subsequent amendments. The clause did not allow for alternative or extended interpretations, and time was expressly made 'of the essence' under cl 38.16.

[19] Moreover, the court applied the *contra proferentem* rule, resolving any potential ambiguity against the appellant, who had drafted the SPAs.

[20] The Court of Appeal further applied the well-established O 14 test for summary judgment under the ROC 2012, which required the plaintiffs to show that the defendant had no arguable defence.

[21] The court concluded that the interpretation of the commencement date was purely a question of law, not fact or a mixed question, and found that the defendant had failed to raise any genuine triable issue or compelling reason for a full trial.

[22] Additionally, the Court of Appeal dismissed the defendant's reliance on para 6 of the Recital and cl 12.5, provisions that permitted building plan amendments, on the basis that these clauses had no bearing on the delivery timeline, which was governed solely by cll 13.1.1, 35A.1, and Schedule A. Applying the interpretive maxim *generalia specialibus non derogant*, the court found that these specific provisions on timelines prevailed over more general ones.

[23] The Court of Appeal found no error of law by the High Court in its interpretation of the SPAs, affirmed the summary judgment and dismissed the defendant's appeal with costs.

IN THE FEDERAL COURT

[24] On 16 January 2025, the defendant was granted leave to appeal on the following two questions of law and they are as follows:

(a) first question of law:

> Whether in a sale and purchase contract for commercial property, when the 'time for delivery of vacant possession' is provided to be calculated from a date of a period of time set out in the said contract for an event which occurred within the said period of time, whether the said calculation ought to begin from the expiry of the said period of time and not prior to the said expiry?
>
> [Sama ada dalam suatu perjanjian jual beli untuk hartanah komersil, apabila 'masa untuk penyerahan milikan kosong' diperuntukkan untuk dikira dari suatu tarikh tempoh masa yang diperuntukkan dalam kontrak tersebut untuk sesuatu peristiwa yang akan berlaku dalam tempoh masa tersebut, sama ada pengiraan tersebut harus bermula dari tamat tempoh masa tersebut dan bukannya sebelum tamat tempoh masa tersebut?]

(b) second question of law:

> Whether in a sale and purchase contract for commercial property, when the 'time for delivery of vacant possession' is provided to be calculated from a date of a period of time for approval of building plans and 'building plans' has been defined to include 'any and all such amendments, alterations and modifications thereto', whether said calculation ought to begin from the date of the first/original approval of the building plan or the relevant date of the last amendment of the building plan subject to the prescribed said period of time?
>
> [Sama ada dalam suatu perjanjian jual beli untuk hartanah komersil, apabila

A 'masa untuk penyerahan milikan kosong' diperuntukkan untuk dikira dari suatu tarikh tempoh masa untuk kelulusan pelan-pelan bangunan dan pelan-pelan telah didefinisikan untuk merangkumi 'mana-mana dan kesemua pindaan, pengubahsuaian dan modifikasi yang sedemikian kepada yang sama' ('any and all such amendments, alterations and modifications
B thereto'), sama ada pengiraan tersebut harus bermula dari tarikh kelulusan pelan-pelan bangunan yang pertama/asal atau tarikh yang relevan untuk pindaan terakhir pelan bangunan tertakluk kepada tempoh masa yang diperuntukkan?]

C *Whether a question of law arising from facts not in dispute may be disposed of by way of a summary judgment application*

[25] The principles of law governing summary judgment is trite and known to all who appear before our courts and more so those who appear before the
D apex court. It is eminently suitable for cases where the facts are indisputable and undeniable and a case where the court needs only to apply the law.

[26] As is often the case, the respondent to a summary judgment application may in its affidavit to oppose raise matters that are said to be amenable to
E resolution only after a trial is had on ground apparently that there is a conflict of affidavit evidence. The court need not have to immediately wring its arms and conclude that the matter ought to proceed to trial and the summary application dismissed. If that be the case then it would be very easy to thwart any application for summary judgment and in the process the whole purpose of
F summary judgment in saving the court's time and in preventing abuse of the court's process in raising frivolous and unmeritorious claims would have been skirted.

[27] The court confronted with such a conflict of affidavit evidence would
G weigh and consider if the denials are equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, following the advice of Lord Diplock speaking for the Privy Council in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 217.

H

[28] This underlying philosophy and approach was well captured in the Supreme Court case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 where Mohamed Azmi FCJ for the majority said:

I In our view, basic to the application of all those legal propositions, is the requirement under O 14 for *the court to be satisfied on affidavit evidence that the defence not only has raised an issue but also that the said issue is triable*. The determination of whether an issue is or is not triable must necessarily depend on the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking for the

Privy Council in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 had this to say at p 217:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue. (Emphasis added.)

[29] Thankfully in the appeal before us the key facts necessary to decide on liability for a late delivery claim in LD by purchasers of an office unit from a developer are not in dispute. What is in dispute is the interpretation of the relevant clauses in the SPA with respect to completion period or time of delivery of vacant possession and consequently the calculation of the LD.

[30] That issue of interpretation of contract is a pure question of law which is plainly within the purview of the court to decide in hearing a summary judgment application. Sometimes the issue of interpretation may require a more careful consideration especially when there are conflicting authorities. However, it is an exercise that does not require the court to hear witnesses on their understanding of the relevant clauses in question.

[31] Rarely would factual witnesses be necessary to give oral evidence as to what they understood the contract to mean unless there are issues of estoppel and subsequent course of conduct of the parties pointing to a variation or waiver of certain terms in a contract. Thus, where the facts necessary to decide a dispute are not in issue and everything hinges on the interpretation of the relevant clauses as in this case, in the SPA with respect to a claim for LD for a

late delivery claim, such a claim can be more than appropriately disposed of by way of a summary judgment application.

[32] The Supreme Court in *Bank Negara Malaysia* had given approval to this approach in dealing with a question of law in a summary judgment application as follows:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment, merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* [1949] 1 All ER 197; and *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 at p 516).

[33] This approach is nothing new. As far back as the case of *Esso Standard Malaya Bhd v Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168, Raja Azlan Shah J, as His Royal Highness then was in the Kuala Lumpur High Court, had held under the then O 14 of the Rules of the Supreme Court 1957 as follows:

> It is I think right that an order under RSC O 14 should be made only if the court thinks it is a plain case and ought not to go to trial. *If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.*
>
> I am satisfied that there are no triable issues. This is simply a case of construction of the letters passed between the parties and I decided that in favour of the plaintiffs. I therefore allowed the application with costs. (Emphasis added.)

[34] His Lordship later as CJ (Malaya) also reiterated the same approach in the case where a decision would hinge on the interpretation of relevant provisions in a statute and thus a pure question of law in the Federal Court case of *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196. In allowing summary judgment the Federal Court held at p 199 as follows:

> ... An O 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the University and University Colleges Acts and related legislation come into an O 14 case, attention in principle is to be given by the court to that class of action than to any other class of action. The only point is that as everybody knows the pertinent legislation is long and complicated. But it is not sufficient under an O 14 case to flourish the title of the University and University Colleges Act, etc, in the face of the court and say that is enough to give leave to defend. *If a point taken under the Acts is quite obviously an unarguable point, and the court is satisfied that it is really unarguable, the court has precisely the same duty under O 14 as it has in any other case*. The court has the duty to apply the rule: (see *Tong Lee*

Hua v Yong Kah Chin [1981] 2 MLJ 1).

In *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* I pointed out that in an O 14 case, where it turned on the construction of a few documents, and the court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. We think we can safely apply that principle to the present case. On the view we have taken of the construction of Act 30 of 1971, and the Constitution of the University, the University had an absolutely hopeless case. The only function of the court is *jus dicere* and to ascertain the intention of Parliament from the words used in the statutes and nothing more. No useful purpose would then be served to go formally to trial. (Emphasis added.)

[35] The question of construction or interpretation of the relevant clauses in the contract may require longer scrutiny in some cases where parties take a diametrically different stance, but as no further facts and indeed nothing new would emerge at the trial, there is no necessity to proceed to decide that issue of construction of documents at trial merely because the exercise of construction posed some considerable difficulties.

[36] The court in construing the documents may agree with the plaintiff applicant in which case it is perfectly proper to allow a summary judgment to be entered even though the claim may be for a huge sum.

[37] In the event that the court does not agree with the applicant where the construction of the clauses are concerned, the court is not at liberty to strike out the plaintiff's claim but merely to dismiss the summary judgment application and to give the defendant unconditional leave to defend. The defendant in the suit may want to take the cue and apply for the plaintiff's claim to be struck out. See the case of *Diamond Peak Sdn Bhd & Anor v Tweedie* [1980] 2 MLJ 31.

Whether the 'time for delivery of vacant possession' is to be calculated from a date of a period of time set out in the said contract for an event which occurred within the said period of time, or whether the said calculation ought to begin from the expiry of the said period of time

[38] The relevant clauses in the SPA are set out below:

13.1 Delivery of vacant possession

13.1.1 The Developer shall complete and deliver vacant possession of the said Parcel in accordance with the terms and conditions of this Agreement within the period stated in Section 10 of Schedule A hereto PROVIDED THAT if in the opinion of the Developer's architect completion or delivery of vacant possession of the said Parcel is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any other cause beyond the Developer's control or by reason of the Purchaser requiring the execution of any addition, works

A or alterations to the said Parcel, then in any such cases, the Developer's architect shall make a fair and reasonable extension of time for completion of the said Parcel and delivery of vacant possession hereunder.

13.1.2 In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under Clause 13.1.1, the Developer shall pay to the Purchaser liquidated damages to be calculated from day to day at the Agreed Rate on such part of the Purchase Price that has been paid by the Purchaser to the Developer and such sums shall be calculated from the date of expiry of the period stated in Section 10 of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser.

13.1.3 For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

...

35A.1 The Developer shall at its own costs and expense obtain the following:

(a) the Conversion Approval from the Appropriate Authority; and

(b) the approval of the Building Plans;

within twelve (12) months from the date of this Agreement (hereinafter referred to as 'the Period of Approval') and subject to a further extension of six (6) months from the expiry of the Approval Period (hereinafter referred to as 'the Extended Approval Period').

...

38.16 Time

Time wherever mentioned shall be of the essence of the contract in relation to all provisions of this Agreement.

...

Section 10 to Schedule A

7. Agreed Rate

Ten per cent (10%) per annum on daily rests (before as well as after court order or judgment).

...

10. Time for delivery of vacant possession

Forty-Two (42) calendar months from the date of the Period of Approval or the Extended Approval Period.

[39] Without doubt the 'time for delivery of vacant possession' is vitally important because that would be the basis for calculating LD for late delivery which would run after the expiry of the 'time for delivery of vacant possession'.

Generally, there is no problem ascertaining when the 'time for delivery of vacant possession' should be because it is pegged to an objective date which in the Standard Form SPA under Schedule G or H under the Housing Development (Control and Licensing) Regulations 1989 ('the HDR') is 24 months or 36 months respectively from the date of the SPA.

[40] However, in this case the appellant as the developer was keen to have the SPA signed even before the approval of the building plans. The developer can have its own bespoke SPA because a SOVO or an office unit is not governed by the Housing Development (Control and Licensing) Act 1966 ('the HDA') and the Regulations made thereunder as the Act governs the construction of 'housing accommodation' and not 'office'.

[41] The 'time for delivery of vacant possession' had been objectively stated under section 10 (Schedule A) to be 42 months from the date of the period of approval or the extended approval period. Like all period of a time it runs from a specific date and here it is firstly 'the date of the Period of Approval'.

[42] Thus, if the date of approval of the building plans is on a date after the SPA was signed and within the period of the 12 months from the date of the SPA, then that date is taken to be the date from which the 42 months is calculated. Here the conversion approval was on 17 January 2012 and the building plans were approved by the local authority on 2 August 2012. Learned counsel for the appellant took the earliest SPA date as 19 August 2011 which would then yield the expiry of the 12 month period of approval to be 19 August 2012 and the further extension of six months under the extended approval period to be 19 February 2013.

[43] The 42 months to deliver vacant possession should then run from 2 August 2012 which is 'from the date of the period of approval and NOT from the date *of the expiry* of the period of approval which is 19 August 2012 as the words underlined are not there and the meaning of the provision would be changed drastically if we were to read into the provision the underlined words that are not there. The expression 'the date of the period of approval' can only mean the date that falls within the period of approval.

[44] We must restrain from reading into the provision of section 10 (Schedule A) words that are not there ie 'from the date *of the expiry* of the period of approval'. Here the 'extended approval period' is not engaged as the building plans approval had come during 'the period of approval'.

[45] Being a commercial agreement, the relevant clauses must be interpreted in a business common sense manner. It does not comport with business common sense to say that whilst the building plans approval had been before

A the expiry of the approval period, one must still wait for the expiry of the period of approval when section 10 does not say that. There is also no rationale for postponing the date time starts to run for completion since construction can already be commenced once the building plans are approved.

B **[46]** The Federal Court speaking through Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, explained the essence of this business common sense method of interpretation as follows:

C [78] Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v Britton and others* [2015] AC 1619), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 para 21 that:

D

> ... if there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

E **[47]** Perhaps the drafter of the relevant clause in section 10 (Schedule A) was also catering to a situation where the building plans approval had not been obtained even after the expiry of the 18 month waiting period called the 'extended approval period' in which case the argument can be made that the 42 months starts from the expiry of the extended approval period.

F

[48] Such a necessity to so interpret does not justify taking the expiry of the approval period for the purpose of calculating LD in a case like the present where the building plans approval was obtained before the expiry of the approval period. It also does not justify taking the expiry of the extended approval period to calculate the 42 months for 'the time of delivery of vacant possession' in a case where the building plans approval was obtained after the expiry of the approval period and before the expiry of the extended approval period.

G

H **[49]** Learned counsel for the appellant submitted that a 'date of a period of approval' is not a usual specified date as in this case the building plans approval. We understand a date to be an objective date that belonged to a 'period of approval' and not a 'date at the expiry of the period of approval'. A period of time is between two dates and in this case a commencement date and an expiry date. A building plans approval date falling within a commencement date and an expiry date would be the date of 'a period of approval'.

I

[50] It can also be discerned that the relevant calculation under cl 13.1.2 is

that the LD shall be calculated 'from the date of expiry of the *period* stated in section 10 of Schedule A hereto or the extended date' which is different from the 'date of the *period* of approval or the extended approval *period*', the former being an objectively referenced date from the date of the first approval of the building plans and not 'from the date of expiry of the period', the latter being 19 August 2012. (Emphasis added.)

[51] We do not find any ambiguity here and even if there is, it is to be resolved in favour of the purchasers as the SPA was drafted by the developer and ought to be interpreted *contra proferentum* against the party that drafted the standard form clauses. See the Court of Appeal case of *Abd Rahman bin Soltan & Ors v Federal Land Development Authority & Anor and other appeals* [2023] 4 MLJ 318, at para [52].

Whether when the 'time for delivery of vacant possession' is provided to be calculated from a date of a period of time for approval of 'building plans' which has been defined to include 'any and all such amendments, alterations and modifications thereto', then should the calculation begin from the date of the first/original approval of the building plans or the relevant date of the last amendment of the building plans subject to the prescribed said period of time

[52] Clause 1.1 provides that in the SPA, '*where the context so admits*, the following expressions shall have the following meanings' (Emphasis added.):

> 'Building Plans' 'shall include any and all such amendments, alterations and modifications to the Building Plans'.

[53] Clause 35A.1 and 38.16 further provide as follows:

> 35A CONVERSION APPROVAL AND APPROVAL OF BUILDING PLANS
>
> 35A.1 The Developer shall at its own costs and expense obtain the following:
>
> (a) the Conversion Approval from the Appropriate Authority; and
>
> (b) the approval of the Building Plans;
>
> within twelve (12) months from the date of this Agreement (hereinafter referred to as 'the Period of Approval') and subject to a further extension of six (6) months from the expiry of the Approval Period (hereinafter referred to as 'the Extended Approval Period').
>
> ...
>
> 38.16 Time
>
> Time wherever mentioned shall be of the essence of the contract in relation to all provisions of this Agreement.

[54] Learned counsel for the appellant in the Court of Appeal tried unsuccessfully to persuade the court that since the definition of 'building plans'

A shall 'include any and all such amendments, alterations and modifications to the building plans' then as a consequence the time of approval of the 'building plans' would be the date of approval of the last approval of the amended 'building plans'.

B **[55]** The Court of Appeal was of the view that the business common sense interpretation of cl 13.1.1 read with section 10 (Schedule A) would be that the 42 months is from the date of the 'period of approval' or 'extended approval period' of the local authority's first approval of the building plans and not on the local authority's last approval of the amended building plans.

C

[56] The Court of Appeal found that it was very clear that the 42 months time period commenced 'from the date of the period of approval or the extended approval period' which 'period of approval' in turn commenced from the date of the SPA under cl 35A.1 and subject to a further extension of six
D months from the expiry of the 'period of approval'. The Court of Appeal reasoned that once the appellant had obtained the local authority's first approval of the building plans, the appellant could immediately start the construction of the development area.

E

[57] If we may add, the appellant's interpretation of making the 42 months run from the date of the last approval of the amended building plans would mean that the 42 months to deliver vacant possession can be a moving or roving time as before any amended building plans were submitted for approval, the
F 42 months is fixed but then it can recommence at a later date depending on the number of amended building plans that may be subsequently submitted which the local authority may approve!

[58] That kind of an interpretation would not comport with business
G common sense and indeed it would fly against the provision of cl 38.16 that had made time wherever mentioned to be of the essence of the contract in relation to all provisions of the SPA. Indeed cl 38.16 would be rendered otiose and denuded of any meaning.

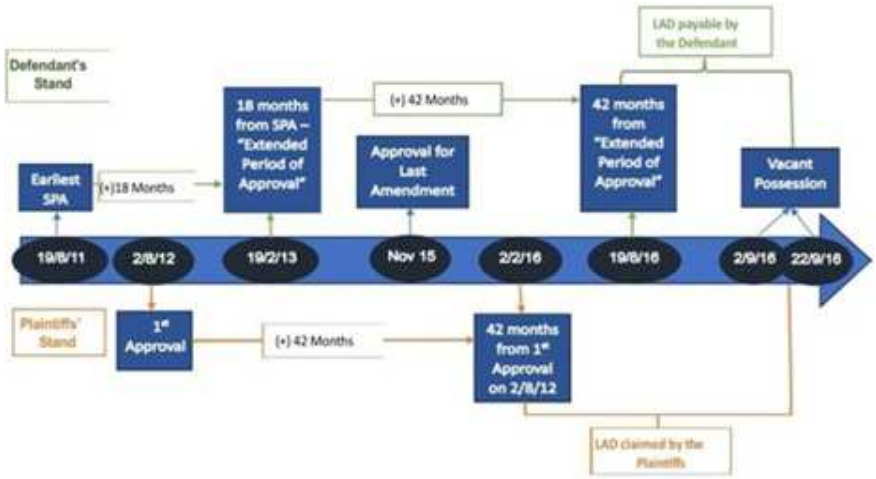
H **[59]** Such an interpretation would also be a fertile ground for abuse as the appellant sensing that completion would be due can always put in another amendment no matter how minor and once approved by the local authority, would secure a fresh extension of time to deliver vacant possession.

I **[60]** No evidence had been alluded to in the affidavit to oppose the summary judgment as to the kind of amendments represented in the last approval by the local authority and how that last approval of the amended building plans had affected the construction of the buildings that could have commenced from the date of the first approval of the building plans.

[61] Where a harmonious interpretation can be had by reading the various clauses in tandem with one another, then that is to be preferred rather than a disjointed reading that keeps extending the time of delivery of vacant possession irrespective of how many amended building plans there may be.

[62] Before us in the Federal Court the appellant has mellowed and settled for the fact that since the date of the last approval of the amended building plans was in November 2015, then the time of delivery of vacant possession of 42 months should run from the expiry of the 'extended period of approval' on 19 February 2013 in which case the time for delivery of vacant possession should be on 18 August 2016 instead of 2 February 2016, therefore reducing substantially the delay to be between 19 August 2016 and 2 September 2016 or 22 September 2016 being the undisputed dates of delivery of vacant possession.

[63] The appellant's summary of the argument in a flow chart timeline is reproduced below for ease of comparison between the appellant's and the respondents' arguments:



[64] At the risk of repetition, we reiterate that 42 months 'from the date of the period of approval' means 42 months from the date of the first approval of the building plans and NOT 42 months from the last approval of the amended building plans which in any event, according to the appellant, should run from 'the date of … the extended approval period' since the last approval was after the date of the extended approval period.

[65] We hasten to add that context is paramount and this is captured by the qualifying words in cl 1.1 of the SPA, '*where the context so admits*'. It does not

necessarily mean that each time the expression 'building plans' appear one must read it to cover 'amended or altered or modified building plans'. The context may not justify that interpretation as to allow that would mean that even though the building plans had been approved, the time to deliver vacant possession would be extended each time an amended building plan is approved by the local authority such that if the last approval is past the 'extended approval period' then the last date of that period is taken as the commencement date of the calculation of the 42 months to deliver vacant possession.

[66] The various references to 'building plans' to include 'amended building plans' is to highlight the fact that the purchasers cannot annul the SPA and that neither party shall make further claims for damages or compensation on the other arising out of the amended building plans. This is clearly discerned from Recital (6) to the SPA where the context for the need to amend the building plans was set out as follows:

> (6) The Purchaser acknowledges that at the time of signing of this Agreement, *the Purchaser is fully aware of the possibility of changes to the drawings and plans annexed hereto in respect of the said Parcel* (as defined below) and/or any components within the said Project and/or Phase 2 as may be required by the Developer's architect and/or the Appropriate Authorities, as the case may be. *The Purchaser fully accepts such changes (if any) and the changes (if any) shall not entitle the Purchaser to annul this Agreement or nor shall it be the subject of any claim for damages or compensation by the Purchaser.* (Emphasis added.)

[67] This is further reiterated in the following cll 12.5 and 35.5:

> 12.5 *Developer's right to amend plans of the said Parcel*
>
> The Purchaser hereby acknowledges and agrees that the Developer shall be entitled from time to time to make such amendments, variations or substitutions thereto as may be required by the Appropriate Authority from time to time or as the Developer's architect shall consider expedient and/or necessary to the said Parcel and/or the Building Plans *without Incurring any liability of any kind whatsoever to the Purchaser in respect hereof, and the Purchaser is not entitled to annul this Agreement nor be entitled to any reduction of the Purchase Price or any damages in respect thereof* PROVIDED ALWAYS THAT any such alteration or substituted materials shall be of approximately the some quality and standard of workmanship as that set out in the plans. details and specifications contained in this Agreement.
>
> ...
>
> 35.5 *The said Parcel to form part of the Development*
>
> The Purchaser has notice of and hereby acknowledges that the said Parcel forms part of the overall Development and by reason whereof the condition state nature and character of the overall Development may be altered from time to time during the continuance of such development. Notwithstanding the provisions herein, the Purchaser hereby covenants and agrees that *no such alterations of the Building Plan or any other plan, condition and state of the parcels and/or the Development shall annul*

> *this Agreement or be subject to any claim for damages or compensation on by either party* and the Purchaser hereby covenants that the Purchaser shall accept and be deemed to be satisfied with the said Parcel in the condition and state as on the date of completion of the development. The Developer may, if it so decides, constructs additional buildings and/or additional storeys and/or additional works in relation to the Development. (Emphasis added.)

[68] Thus, where the grammatical meaning of the definition of 'building plans' would be wide enough to cover even all and any including the last approved building plans, the context does not admit it for the purpose of determining the time for delivery of vacant possession which is to run from the date of the first approval of the building plans.

[69] Principles of interpretation of contract have moved from a rigid literal grammatical and internal linguistic consideration to that of a purposive reading based on the factual matrix of facts within the context of the transaction in question as representing the reading of the relevant clauses of the contract as a whole. No contracts are made nor come into existence in a vacuum. It has a setting that is captured in the recital with words having its proper shade in its colour borne out from its context and its proper scope in its contours being evident in the whole context of the contract.

[70] This dynamic and discerning approach can be seen in the speech of Sir Thomas Bingham in *Arbuthnott v Fagan & Others* [1994] Lexis Citation 4136; [1995] CLC 1396 at p 1400 in the Court of Appeal as follows:

> Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as *the context, the background, the factual matrix or the mischief.* To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it was expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he meant. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: *the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis.* (Emphasis added.)

[71] Lord Hoffmann in the House of Lord's decision in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at p 913 further distilled this approach in some five principles laid down of which the principles (4) and (5) as set out below would be relevant:

> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. *The meaning of*

words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945).

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, p 201: ... *detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense*. (Emphasis added.)

[72] Applying what has been variously called the contextual, harmonious and business common sense approach, we are more than satisfied that the meaning of the date of the approval of 'building plans' cannot stretch to that of the date of the last approval of 'building plans' for the purpose of determining the 42 months to deliver vacant possession even though pedantically and definition-wise 'building plans' would include 'all amendments, alterations and modifications to the building plans'.

[73] Clause 1.1 with the qualifying words of 'where the context so admits' constrains us to consider the context of the definition of 'building plans' before applying it in particular to cl 13.1.1, section 10 of Schedule A, cll 35A.1 and 38.16.

Whether there ought for some other reason to be a trial of the claim

[74] In what appears to be a valiant attempt to persuade this court to allow the appeal and to have the issues tried in a full trial, learned counsel for the appellant argued that the principle in *Miles v Bull* [1968] 3 All ER 632 would apply to justify a trial of the issues.

[75] The fact that the question of law is at first blush of some complexity and therefore takes a little longer to understand, does not by itself bring the application within the exception under O 14 r 3 of the ROC under the rubric of where 'there ought for some other reason to be a trial of that claim' in what

is popularly referred to as the principle in *Miles v Bull* [1968] 3 All ER 632. In that case it was stated as follows at pp 637–638:

> ... If the defendant cannot point to a specific issue which ought to be tried, but nevertheless *satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff* ...
>
> ...
>
> I think it is. In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think it would be just if the plaintiff were able to enforce the rights that he claims without being put to strict proof that they do enable him to evict the defendant. I was told that in granting leave to defend Master Jacob said that the case was 'too near the bone for O 14. That, if I may say so, seems to me to summarise admirably what I have tried to express in greater detail. *RSC Ord 14, is for the plain and straight-forward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision*. (Emphasis added.)

[76] The above principle in *Miles v Bull* was applied in *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 3 MLJ 1, a Singapore High Court case and the Federal Court case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657 at p 668 as follows:

> In the present appeal, there are circumstances which, in our opinion, constitute 'some other reason to be a trial'. First, although the defendants barely denied that they were constructive trustees for the deposited amount for and on behalf of the Majlis, the onus was on the Majlis to prove their claim. Indeed, on the authority of Lipkin Gorman, the law on constructive trustee in the context of banker/customer relationship is quite complicated and technical in nature, and that being so, a claim based on it could only be properly proved by oral evidence. Secondly, the evidence about the two fixed deposit receipts No 209431 and 209451 disclosed at the criminal trial of the Majlis's former President, Dato' Rahmat, may have a bearing on the present case. Needless to say the two fixed deposit receipts are crucial to the defendants' entire defence in the case. Both parties were unaware of the criminal proceedings until, as we have said, counsel were put to notice at one of the earlier hearings of this appeal. Therefore, in the interest of justice, it is desirable that the defendants be given every opportunity to examine fully the record of the criminal proceedings, which inevitably may provide them some materials for their defence.

[77] In the present appeal there is nothing devious or crafty where the claim is concerned and neither is there any need for any further investigation into the facts. There is nothing peculiar but on the contrary, something quite plain and

anyone familiar with the claim by purchasers of LD for late delivery of houses in Malaysia would be familiar with the many cases that have been decided on the issue. It is a very well-trodden area of the law and not a venturing into a domain where the route has not been charted.

[78] We therefore dismissed the argument of the learned counsel for the appellant that the difficulties presented in interpreting the relevant provisions on LD claim would bring this claim within the rubric of O 14 r 3 where 'there ought for some other reason to be a trial of that claim'.

Whether the appellant may be allowed to raise a fresh question of law not raised in the two questions of law for which the Federal Court had granted leave to appeal

[79] As a last-minute attempt to persuade this court to allow the appeal and to remit the matter back to the High Court for trial, learned counsel for the appellant tried to prevail upon this court to answer a question not posed for the leave application to the Federal Court when it was made under s 96 of the Courts of Judicature Act 1964.

[80] It was with respect to the correct interpretation of cl 13.1.2 that reads:

> 13.1.2 In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under Clause 13.1.1, the Developer shall pay to the Purchaser liquidated damages to be *calculated from day to day at the Agreed Rate on such part of the Purchase Price that has been paid by the Purchaser to the Developer* and such sums shall be calculated from the date of expiry of the period stated in Section 10 of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser.

[81] It was argued that 'such part of the purchase price that has been paid by the purchaser to the developer' would be different from the full purchase price. That was not the question of law posed for the leave application and as such the Federal Court would not generally venture to answer questions raised for the first time when the appeal is heard with respect to the questions of law that had been allowed to be argued during leave stage when the justice of the case does not demand it as in preventing a miscarriage of justice.

[82] It must be stated that an appeal to the Federal Court from a decision of the Court of Appeal is not by way of a re-hearing as is an appeal from the High Court to the Court of Appeal. See s 69(1) of the CJA. The strict provision of 'Appellate Jurisdiction — Civil Appeals' of the Federal Court in s 96 of the CJA reads as follows:

> 96 Conditions of Appeal

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[83] Rule 47(4) of the Rules of the Federal Court 1995 further followed up by reiterating the same restrictions as follows:

(4) The hearing of the appeal shall be confined to matters, issues or questions in respect of which leave to appeal has been granted.

[84] It is axiomatic that the ambit and scope of an appeal to the Federal Court from that of a Court of Appeal must be necessarily confined to the questions of law for which leave was granted for such an appeal is not as of right and neither is it by way of a re-hearing. We would therefore hearken to the cautionary constraint issued by the Federal Court in *Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor* [2018] 4 MLJ 34; [2018] 4 CLJ 705 as follows:

[30] *The appeal should be confined only to the questions as determined by this court in granting leave to appeal, and other grounds which are necessary to decide on those questions.* As this court has held in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at p 173; [1998] 3 CLJ 503 at p 536–537:

Under r 108(1)(c) of the Rules of the Federal Court 1995, the Federal Court may determine or frame the questions or issue which ought to be heard in the appeal; in my view, this discretionary power given statutorily must be given effect to. In other words, *only the issues or questions thus framed would be heard or entertained.*

The approach I would adopt when it is disputed whether any stated ground in the said memorandum of appeal is outside or not the scope of issues that the Federal Court framed in granting leave is whether such ground is, prima facie, necessary to enable the court to decide the said issue with precision. If it is not, the ground is thus outside the scope.

[31] *The parties should confine their submissions to the questions of law posed, and are not entitled to seek a complete rehearing to review the concurrent findings of fact made by the courts below.*

In *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166; [2015] 4 CLJ 20 at para [22], this court held that:

> The submissions advanced by learned counsel for the defendants in support of those issues are in effect seeking a reversal of the findings of facts in this case on the infringement of the trademark by the defendants with the resultant consequential orders. *In our view this would result in a complete re-hearing of the appeal on those issues and would be a complete disregard to the provision of s 96(a) of the Courts of Judicature Act 1964 when leave to appeal to this court was granted. The two questions posed before this court when leave was granted have been couched to incorporate a point of law which if answered in the affirmative or negative has the effect of reversing the conclusions made by the Court of Appeal without any further evaluation of the evidence. It is the answers to those questions which must have the effect of reversing the conclusions made by the Court of Appeal and not the result of a review of the concurrent findings of facts made earlier on. The questions posed must also relate to a matter in respect of which a determination has been made by the Court of Appeal* (see the case of *Meidi-Ya Co Ltd, Japan & Anor v Meidi (M) Sdn Bhd* [2009] 2 MLJ 14). We therefore rule that the defendants should only be allowed to confine their arguments on the two questions of law posed before this court. (Emphasis added.)

[85] There is still another impediment to allowing a new question of law to be ventilated at this late stage as both the High Court and the Court of Appeal had arrived at a concurrent finding that the summary judgment containing the judgment sum as prayed for was rightly entered against the appellant. The appellant cannot be arguing an objection to a summary judgment application in stages, searching for a new triable issue or stumbling across it as it exhausts the last rung of appeal. It cannot be improving its case through the tiers of appeal and supplementing what was lacking in the High Court and not argued in the Court of Appeal and as such no finding by the Court of Appeal.

[86] In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257 at p 273; [2003] 3 CLJ 349 at p 364 (FC), Abdul Malek Ahmad FCJ observed:

> In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact, there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of facts made by the courts below as held by this court in *Lim Geak Liang v East West Umi Insurance Bhd* [1997] 3 MLJ 517; [1997] 4 CLJ 405. Therefore, in the final analysis, the fact remains that it was the appellants who were in breach of the agreements. In the

premises, the appeal by the appellants should, in our humble view, be dismissed with costs. A

[87] See also the recent decision of the Federal Court in *Teoh Kiang Hong v Theow Say Kow @ Teoh Kiang Seng, Henry* [2025] 1 MLJ 813; [2025] 2 CLJ 683 at para [18]. The Federal Court is not entitled to interfere merely because it would have reached a different conclusion had it been hearing the case at first instance (see: *The New Straits Times Press (M) Bhd v Aideah Communication Sdn Bhd* [2025] 3 MLJ 240; [2025] 5 CLJ 661 (FC), at para [34]. B

C

[88] We are not unaware that r 57(2) of the Rules of the Federal Court 1995 does confer some discretion on the Federal Court as the apex court in preventing a miscarriage of justice when it provided a slitter of opening as follows:

(2) The appellant shall not at the hearing without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant. D

[89] In *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 at 325A-I, the Federal Court held that it has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice. E

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[90] A more recent Federal Court in *Melawangi Sdn Bhd v Tiow Weng Theong* [2020] 3 MLJ 677 also echoed the same sentiments and confining it to only very limiting circumstances in order to achieve the ends of justice as follows:

[34] In resisting the submissions, learned counsel for the defendant made this point. He pointed out that none of the questions for which leave was granted relate to or deal with this issue. As such, this issue should not be raised in the present appeal. G

[35] We have given our utmost considerations of the submissions of learned counsel for the defendant. In the circumstances of the present case, we do not agree. Like all general rules there are exceptions. As we have said in the recent case of *Noor Azman bin Azemi v Zahida bt Mohamed Rafik* [2019] 3 MLJ 141; [2019] 3 CLJ 295 as a matter of broad general principle, a party is not precluded from raising a new issue in an appeal because this court has the power and therefore the discretion to permit a party to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (see: *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; [1999] 2 CLJ 471 and *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145). We must add here that *the discretion must, however, be exercised judiciously and sparingly, and only in very limited circumstances in order to* H

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A *achieve the ends of justice. It has to be performed with care after giving serious considerations to the interests of all parties concerned.* (Emphasis added.)

B **[91]** We are not satisfied that in this case we should exercise our discretion to allow a fresh question of law to be answered when it was not argued in the High Court nor the Court of Appeal. The ends of justice does not demand it. In any event we find no merits in the said argument of the appellant. That clause must of course be read in the context of cl 13.1.3 as stipulates as follows:

C 13.1.3 For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

D **[92]** The purchasers can only make a claim for LD for late delivery after they had taken vacant possession which would be after they had paid the full purchase price. The appellant as developer should not be allowed to take advantage of its own breach in failing to deliver vacant possession on time and then limiting the calculation of the LD based on the amount of purchase price paid at the date of contractual delivery of vacant possession when the purchasers were able and willing to pay the full purchase price as seen from the E undisputed fact that they had done so upon taking vacant possession.

F **[93]** To peg the calculation of the LD based on the amount of purchase price paid at the point of entering into the late delivery period would be to reward the developer for the delay as what the purchasers are deprived of is vacant possession of their completed unit which is represented by the full purchase price and not uncompleted unit representing the amount of purchase price paid up to that stage of completion.

G **[94]** To accede to the developer's argument would be to allow the developer to profit from its own breach to the detriment of the purchasers who would have to continue servicing the interests on their loans and at the same time being deprived of use of the completed unit or derive rental income from the completed unit. It would be to subject purchasers to a double whammy and as H such unconscionable in all the circumstances of the case.

DECISION

I **[95]** We find that at the end of the day the questions of law posed are case-specific and case-sensitive in that the interpretation of the relevant clauses would be dependent on the way they are drafted as interpreted against the context of the whole SPA. Little value would be served by giving direct answers to the questions of law posed as each case would be different from the others in bespoke SPAs drafted by developers as they do not fall in the case of offices

within the statutory prescribed Standard Form SPAs under Schedule G or H of the HDR.

[96] We therefore see no necessity of answering the questions of law posed save to allude to the general principles and approved approaches to interpreting contractual terms.

[97] We had therefore dismissed the appeal with costs and affirmed the decision of the Court of Appeal below. Considering the number of purchasers involved we ordered costs of RM80,000 to the respondents subject to allocator.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh